NOTES

EMPLOYERS' LIABILITY IN INSURANCE THEORY

The common-law rule with regard to the employers' liability for accidents to employees proceeds upon the simplest of contractual principles. Different occupations have their differing degrees of discomfort, of unwholesomeness, and of hazard. Whoever, either as employer or as wage-earner follows any occupation is taken to be aware of the nature and the degree of its discomforts and dangers. Both profits and wages are notoriously affected—in some measure—by these influences. If the peculiar disadvantages are appreciable in this regard, the remunerations will, it is assumed, take adequate account of the disadvantages. Under the commonplace working of the law of demand and supply, the laborer is supposed to be paid the market value of the risk to which his occupation subjects him. If injury befalls, he has by anticipation been paid for his voluntary acceptance of this risk: he has carried his own insurance, and has been paid for carrying it. Any claim to indemnity is held to attach only when the employer has failed of due and reasonable care in the performance of his share in the joint undertaking The carelessness of fellow-employees—of co-servants—is to be traced back to the frailties of our common human nature and is thus inseparable from the ongoing of human activity. Hazards of this sort are necessary incidents of the joint activity of men in productive enterprises, and cannot altogether be avoided by any degree of employer caution and foresight. The employer is liable only for that which he could have provided against; only when, in the selection or the supervision of his servants or in the general conduct of the business, he has failed of exercising due and reasonable care, is he properly to be regarded as falling short of the performance of the obligations constructively assumed by him under the wage contract. And if he cannot be regarded as guaranteeing his employee against the carelessness of coemployees, still less should he be held to indemnify the employee against the employee's own negligence or carelessness.

Purely as a problem within the field of private contract, all this looks reasonable: but it may well be that there are social values involved and that these are of controlling importance.

The theory of the employers' liability acts rests, in truth, upon the fundamental principles of insurance in general. Nor is this basic theory in any wise abstruse. It is, indeed, an immediate corollary of the simple and well-known law of satiation, as worked out under the familiar marginal analysis, and as expressed under the guise of the marginal-utility doctrine. At its simplest—and yet in terms adequate for the present purpose—the marginal doctrine means merely that one does not ordinarily care as much for the second glass of water as for the first—that each succeeding loaf of bread responds to a lower degree of hunger than its predecessor—and, in general, that successive increments of supply attach to lower and lower intensities of need or of desire. It follows, then, that if of ten units of supply, the first has a utility of ten, the second of nine, and so on, the tenth unit will represent a utility of only one, and that the importance attaching to any one separate unit in the whole supply—or the loss experienced with the loss of this one unit—will be felt and appreciated upon the basis of the utility attaching to the tenth item of the series. Note, however, that the loss involved in the loss of the series as a whole is not therefore to be taken as the product of the marginal utility multiplied by the number of items; rather is it the sum of the various utilities—10 plus 9, plus 8, etc.—or an aggregate of 53.

The meaning of this for the theory of insurance is patent: one can afford to deprive himself of a tenth of this entire stock of goods, if only he can be guaranteed against one chance in fifty-three of losing his entire stock. His risk, if carried by himself—his subjective risk—is fivefold greater than the risk as worked out under the law of general averages—the objective risk.

This disproportion between the subjective and the objective risk may, indeed, extend almost to infinity: one who commands double the food supply required for his immediate necessities may well give half of his supply in order to be protected against the one-thousandth of a chance that he be left entirely without food.

Equally obvious and compelling is the argument in favor of sacrificing the marginal unit of one's general income as provision against the remote chance of the loss of all income. Thus the 40-per-cent. expense charge in fire insurance or the 20-per-cent. loading of life insurance can condemn neither system as a reasonable business proposition, despite the fact that the services may be obtained on terms of a cost far in excess of what that cost ought

to be, or even that the wastes of administration occasionally touch the limits of the scandalous.

It is, then, obvious that, even were the employee able to carry his own risk, the employer could carry it much the more cheaply. If the employee attempts to carry it, his wage increase therefor must be altogether disproportionate to the significance of the hazard *to him.* And in actual fact, of course, he cannot in the ordinary case carry the risk at all; his resources are inadequate; public or private charity has to intervene to care for him or for those dependent on him.

The inevitable deduction from the argument as thus far presented is, then, that from the point of view neither of the workingman nor of society ought the laborer to be permitted to act as his own insurer; what the employer can afford to pay to the employee for carrying his own risk—the objective cost—falls far short of the value of the risk as expressed in terms of its subjective cost to the employee.

But there is a further step in the argument; the burden which, superficially viewed, appears, to be imposed upon the employer, does not really rest with him; the indemnity obligation, if general among employers, passes over with other costs to the consumers of the product.

The ultimate question is, then, whether the employees, or charity organizations in the place of the employees, are to make good the costs in life and health incident to the process of production, or, on the other hand, the consumers of the goods are to be subjected to the burden.

Some further propositions—not strictly of theoretical import—await formulation: (1) The recognition of the liability of the employer even for accidents due to the negligence of the employee does not menace any dangerous diminution in the care which the employee will exercise: men do not get injured purposely; (2) A much higher degree of care will be obtained from employers: here the question is purely one of making things pay; (3) The business of insuring employers against accident liability should be outlawed, (*a*) as making for the negligence of employers, (*b*) as preventing the settlement of even those claims admittedly valid and meritorious.

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